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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1333

SOUTHERN ARIZONA BANK AND TRUST COMPANY, a Corporation, and PEGGY L. MARTIN, Executors of the Estate of George Martin, deceased, and PEGGY L. MARTIN, *Petitioners,*

v.

THE UNITED STATES.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The petitioners, Southern Arizona Bank and Trust Company, a Corporation, and Peggy L. Martin, Executors of the Estate of George Martin, deceased, and Peggy L. Martin pray that a writ of certiorari be issued to review the judgment of the United States Court of Claims in this case.

OPINION BELOW

The findings of fact and opinion of the Court of Claims (Appendix B, *infra,* pp. 3a-16a) are reported at 386 F.2d 1002. The judgment of the Court of Claims was entered on November 9, 1967. A motion for rehearing was filed by the petitioners on December 7, 1967, which was denied on January 19, 1968 (Record).

The jurisdiction of the Court of Claims was invoked under 28 U.S.C., § 1491. The jurisdiction of this Court is invoked under 28 U.S.C., § 1255(1).

QUESTIONS PRESENTED

Where a taxpayer is liable by contract and by law for the income taxes of a corporation formerly owned by him, and, through counsel, effects a substantial reduction of such corporate tax liabilities, and consequently his own liability, are the legal fees paid in this regard deductible under the statute allowing a deduction for fees and expenses in connection with the determination of "any" tax?

STATUTES INVOLVED

The statutes involved are § 212 and § 6901 of the Internal Revenue Code of 1954, and they are set forth in Appendix A, *infra,* pp. 1a-2a.

STATEMENT OF THE CASE

Prior to 1955, George Martin owned all the stock in Crystal Coca Cola Bottling Company, a corporation engaged in the bottling business in Tucson, Arizona (Fdg. 3; App. 12a). In 1955 he sold his stock to two individuals who were to form a corporation to carry on the business (Fdg. 4; App. 13a). As a part of the transaction, Martin agreed to indemnify the individual

purchasers and the successor corporation for any claims for income taxes which might thereafter be asserted against Crystal (Fdg. 4; App. 13a). This indemnity agreement, in effect, recognized the legal liability of Martin as a transferee under Arizona and Federal law. The purchasers formed a new corporation, Coca Cola Bottling Co. of Tucson, Inc., to continue the business and Martin received a note for $1,450,000 secured by stock of the new company (Fdg. 4; App. 13a). As of December 30, 1960, the principal balance still owing to Martin on Coca Cola Bottling Co.'s promissory note was $1,009,358.23 (Fdg. 6; App. 14a).

Subsequent to the transaction in 1955 the Government determined income tax deficiencies against Crystal in the amount of $117,057.46 (Fdg. 7; App. 14a). As permitted by the agreement and the applicable statutes, Martin contested this determination, and it was ultimately reduced to $50,872.16 (Fdg. 7; App. 14a). The validity of this assessment against one of the transferees was upheld in *Coca Cola Bottling Co. of Tucson* v. *Commissioner*, 9 Cir., 334 F.2d 875, 877 (1964).

The attorneys' fees and expenses which Martin paid in 1961 in securing the aforesaid reduction of tax liability amounted to $23,659.42 (Fdg. 8; App. 15a). He claimed this amount as a deduction in his income tax return, it was disallowed by the Internal Revenue Service (Fdg. 10; App. 16a), and the disallowance was upheld by the Court of Claims (App. 16a).

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Claims that petitioner was not liable as a transferee—aside from his contract liability—presents a clear conflict with *Bos Lines, Inc.* v. *Commissioner*, 8 Cir., 354 F.2d 830, 835 (1965), and

Bates Motor Transport Lines, Inc. v. *Commissioner*, 7 Cir., 200 F.2d 20, 23 (1952). The opinion below is also believed to differ with the determination of the Court of Claims in *Drew* v. *United States*, 367 F.2d 828, 833 (1966).

2. The decision below, in applying a narrow interpretation to § 212, presents a basic variance with *Beerman* v. *United States*, 6 Cir., 68-1 U.S.T.C. § 9209 (decided February 9, 1968), and with *Bonnyman* v. *United States*, E.D. Tenn., 156 F. Supp. 625, 629, *aff'd per curiam* 6 Cir., 261 F.2d 835 (1958). It also conflicts in principle with the interpretations of § 212 in *Commissioner* v. *Doering*, 2 Cir., 335 F.2d 738, 741 (1964), and *Petschek* v. *United States*, 2 Cir., 335 F.2d 734, 736 (1964).

3. The proper scope of § 212 has been the subject of numerous opinions.[1] The application of this statute presents an important and recurring question of Federal law which has not been, but should be, settled by this Court.

ARGUMENT

As to the status of the petitioners as "transferees" under § 6901 of the Internal Revenue Code of 1954, petitioners can accept the holding of the Court below that the tax involved in the litigation must be one for

[1] The cases are discussed in the following articles: Lamont, "Controversial Aspects of Ordinary and Necessary Business Expense," 42 Taxes 808, 811-814 (Dec. 1964); DeCastro, "Recent Cases Show Liberal Trend in Allowing Deductions for Legal Fees," 23 Jour. of Tax. 224 (Oct. 1965); Note, "Proxy Fight Expenses: Problems of Tax Deduction," 43 Va. L. Rev. 891, 897 (1957); Webster, "Proxy Battle Expenses: Federal Tax Deduction," 44 A.B.A.J. 686, 687 (July 1958).

which the taxpayer is "legally liable" (App. 6a, fn. 4). Petitioners meet this test.

It can hardly be doubted that the Government—even in the absence of a contract—would have had a right to proceed against Martin in the event that Coca Cola Bottling Co. had been unable to pay the deficiency as determined. Martin had received over $400,000 as a result of payments on the note prior to 1961 (Fdg. 6; App. 14a). Thus, he was a transferee of a transferee and was legally liable for the taxes of the transferor if for any reason they were not paid. As was said in *Bos Lines, Inc.* v. *Commissioner,* 8 Cir., 354 F.2d 830 at 835 (1965):

> * * * the tenor of numerous decisions we have examined makes it convincingly clear that the term "transferee," as used in the statute, encompasses a "transferee of a transferee."

The Court below has held that such liability is avoided by the existence of a second corporation as an intermediate step (App. 8a). This conclusion is contrary to that of the Tax Court on somewhat comparable facts. *Alan Foster,* 26 T.C.M. 1143, 1147. If allowed to stand, the opinion below may very well chart the path for future avoidance of transferee liability. All that will be needed is a note from an intervening party.

Turning to the actual deduction of the amounts involved, it is significant that the statute grants a deduction for ordinary and necessary expenses paid "in connection with the determination, collection, or refund of any tax." As was noted in the dissenting opinion of Judge Collins, the legislative history repeatedly uses the expansive word "any" in referring to tax liability

or expense (App. 9a). The statute was enacted to grant taxpayers a deduction which this Court had said they did not have under prior law.[2] *Higgins* v. *Commissioner,* 312 U.S. 212 (1941). As such, the legislation was clearly remedial and should accordingly be liberally construed. *Bonwit Teller* v. *United States,* 283 U.S. 258 (1931).

The statute in providing for a deduction for expenses incurred in the determination of "any" tax is a clear act of legislative grace and in this regard is analogous to the medical expense deduction allowed taxpayers or to the deduction allowed them for interest paid on their personal residences.

It can hardly be doubted that Martin was the real party in interest in contesting the deficiency asserted by the Government.

In the *Beerman, Bonnyman, Petschek* and *Doering* cases, the taxpayers were permitted to deduct their legal fees under § 212 without attempting to key the deduction to the taxation of the rest of the transaction. Three of these Circuit Court opinions resulted from unsuccessful appeals taken by the Government from decisions of the trial courts favorable to taxpayers.

The extent of the litigation in this area shows clearly the need for an authoritative consideration of § 212. The case below is a proper one for the attention of this Court.

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[2] S. Rept. No. 1631, 77th Cong., 2d Sess., p. 87; H. Rept. No. 2333, 77th Cong., 2d Sess., p. 46.

CONCLUSION

There are direct conflicts in decisions as to the application of the transferee provisions and as to the scope of § 212 which require resolution by this Court. The issues occur frequently and are of importance in the administration of the tax law. The petition for certiorari should accordingly be granted.

Respectfully submitted,

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April 1968